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14 || Attorneys for Plaintiff Epic Games, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EPIC GAMES, INC.,

Plaintiff,

21

vs.

Defendant

No. 4:20-CV-05640-YGR

**DECLARATION OF NICHOLAS
PENWARDEN IN SUPPORT OF
PLAINTIFF EPIC GAMES, INC.'S
MOTION FOR A PRELIMINARY
INJUNCTION**

Date: September 28, 2020, 9:30 a.m. (via Zoom Platform)

Courtroom: 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

1 I, Nicholas Penwarden, declare as follows:

2 1. I am Vice President of Engineering at Epic Games, Inc. (“Epic”). I submit this
3 declaration in support of Epic’s Motion for a Preliminary Injunction. The contents of this
4 declaration are based on my personal knowledge. If called as a witness, I could and would
5 competently testify thereto.

6 2. I joined Epic in 2011 and have been Vice President of Engineering at Epic for over
7 a year. Prior to my time as Vice President of Engineering, I was the Director of the *Unreal*
8 *Engine*, the Development Manager for *Unreal Engine 4*, the Lead Graphics Programmer and a
9 Senior Engine Programmer at Epic. In total, I have nine years of experience working on *Unreal*
10 *Engine*. In my current position, I am responsible for outlining and executing the vision for the
11 development of the company’s *Unreal Engine* software, which is a software suite available to
12 third-party developers that allows them to create three-dimensional and immersive digital content.
13 I am responsible for the development roadmap for the *Unreal Engine* and management of the
14 engineering team behind the *Unreal Engine*, and I am ultimately responsible for user support for
15 the *Unreal Engine*’s community of 11 million users. During the time that I have been involved
16 with the *Unreal Engine*, the *Unreal Engine* has received numerous technology and entertainment
17 industry awards, including the first ever Emmy Award for Technology and Engineering for its use
18 in the production of animation.

19 3. As described in more detail in the Declaration of Timothy Sweeney, dated
20 September 4, 2020, the *Unreal Engine* has applications across a broad range of industries,
21 including very wide adoption for the development of video games. One reason for the *Unreal*
22 *Engine*’s popularity among game developers is the breadth of its cross-platform capabilities.
23 Historically, *Unreal Engine 3* (the previous iteration of the engine, which was released in 2004)
24 supported software developed to run on Windows PC, PlayStation 3, and Xbox360. In 2010,
25 Epic expanded *Unreal Engine*’s capabilities to support the iOS and Android platforms as well,
26 allowing developers to offer their *Unreal*-powered applications on players’ smartphones and
27 tablets. As of today, *Unreal Engine 4*, which was released in 2014, supports Windows PCs,
28 macOS, PlayStation 4, PlayStation 5, Xbox One, Xbox Series X, Nintendo Switch, iOS, Android

1 and Stadia. *Unreal Engine* 5 was publicly announced on May 13, 2020, and is currently
 2 scheduled for release next year.

3 4. A large number of developers have used the *Unreal Engine* in developing apps for
 4 use on Apple platforms. As of today, the *Unreal Engine* toolkit has been installed on almost half
 5 a million Mac computers and is used by millions of developers overall to develop their games and
 6 other software. Third-party developers have used the *Unreal Engine* to create some of the top
 7 apps currently on the App Store. For example, the popular game PlayerUnknown’s Battlegrounds
 8 (“PUBG”) alone is installed on hundreds of millions of mobile devices.

9 5. Like other platform providers, Apple makes certain software development tools
 10 widely available to developers that make programs intended to run on iOS and macOS. Apple’s
 11 core tool is Xcode, which provides developers the software features they need to design, develop,
 12 and debug software for use on iOS and macOS. Apple also offers developers software
 13 development kits (“SDKs”), which extend the core Xcode to include additional tools including
 14 “compilers” (computer programs important to software development because they translate
 15 programmed computer code into machine code readable and executable by a computer) and other
 16 frameworks that developers need to ensure their games or other software will work on Apple’s
 17 devices. For a fee of \$99 a year—paid for each separate Apple Developer Program account, of
 18 which Epic has several—a developer obtains the ability to test and deploy software that runs on
 19 iOS and macOS using Apple’s Xcode and other tools.

20 6. On August 14, 2020, at 12:04 a.m. Pacific time, Apple posted a notice in one of
 21 Epic’s accounts with the Apple Developer Program, which stated that it would terminate Epic’s
 22 membership within 14 days unless Epic met certain conditions set by Apple. Without
 23 participation in the Apple Developer Program, developing commercial software to run on Apple
 24 iOS devices is impossible. Indeed, without an Apple Developer Program account, developers are
 25 not able even to test their software on their own personal iOS devices, much less develop and
 26 distribute applications for public consumption.

27 7. Apple’s August 14 notice also contained a list of additional consequences that it
 28 said would flow from the termination of Epic’s Developer Program Account. That list expressly

1 mentions consequences for the *Unreal Engine*. One item on the list is that Epic will “lose access”
 2 to “[a]ll Apple software, SDKs, APIs [application programming interfaces], and developer tools”.
 3 These are software and tools of the type that platform providers—including Apple, Microsoft,
 4 Google and others—make widely available to developers in order to facilitate the development of
 5 software that will run on the platforms. These tools are typically made available by platform
 6 providers either for free or at a modest cost.

7 8. Apple’s revocation of its developer software and tools will make it impossible for
 8 Epic to continue to support *Unreal Engine* on Apple’s platforms, as Epic will lose the ability to
 9 create new versions of *Unreal Engine* for use on both iOS and macOS. It also means that as
 10 Apple upgrades its own operating systems, Epic will not be able to develop updated versions of
 11 *Unreal Engine* designed to support those updates. Apple has already announced plans to release
 12 updated versions of iOS and macOS—called iOS 14 and macOS Big Sur, respectively—this
 13 coming fall. Without access to the software and development tools that Apple makes widely
 14 available, Epic will not be able to support iOS 14 or macOS Big Sur with *Unreal Engine*.
 15 Additionally, Apple typically requires that developers fully switch to Apple’s latest SDKs and
 16 developer tools six months after the release of a new iOS version in order to submit new apps, or
 17 to submit updates to existing apps. Thus, by spring 2021, it is likely that Apple will refuse to
 18 accept any new apps and updates to existing apps that use the *Unreal Engine* due to Epic’s
 19 inability to access those tools.

20 9. Apple’s statement that it intends to terminate all of Epic’s accounts with the Apple
 21 Developer Program and terminate Epic’s access to, among other things, “[a]ll Apple software,
 22 SDKs, APIs, and developer tools”, including for purposes of developing and supporting the
 23 *Unreal Engine*, has prompted numerous *Unreal Engine* licensees to reach out to Epic about the
 24 potential impact to the *Unreal Engine* of Apple’s actions. Specifically, Epic’s licensees have
 25 expressed concern that Apple’s actions would disrupt and impede Epic’s ability to continue to
 26 support *Unreal Engine* for Apple devices and for Epic’s engineers to continue to provide support
 27 to developers working on iOS and macOS projects.

28 10. Dozens of *Unreal Engine* licensees have expressed concern that projects currently

1 in development for iOS and macOS will be disrupted, that they may not be able to launch such
 2 projects on iOS or macOS as they had planned, or that they may need to explore alternative 3D
 3 engines for future projects. The *Unreal Engine* licensees that have contacted Epic are not limited
 4 to game developers but also include licensees that use *Unreal Engine* for other applications and
 5 businesses, including automotive design, film and television, and engineering and construction.¹

6 11. Licensee One, a creative studio that specializes in animation and visual effects, has
 7 told Epic that in light of Apple's intent to terminate Epic's access to iOS development tools for
 8 *Unreal Engine* it could potentially be forced to delay the release of an iOS application it created
 9 for a customer using *Unreal Engine*. Licensee One's customer requested that the project be put
 10 on hold while Licensee One explored alternative 3D engines that could be used to complete the
 11 project. After this Court issued its temporary restraining order enjoining Apple from terminating
 12 Epic's Developer Program accounts that relate to *Unreal Engine*, Licensee One informed Epic
 13 that its customer had decided to continue using *Unreal Engine* to complete the project.

14 12. Licensee Two and Licensee Three, which are film production studios, have
 15 expressed concern to Epic that the virtual production tools that they have developed using
 16 *Unreal Engine* could be rendered inoperable if Apple denies Epic continued access to the
 17 necessary developer tools and other software. These studios' *Unreal Engine*-based virtual
 18 production tools have been used, for example, in television series to create high-quality visual
 19 effects.

20 13. Epic has also received inquiries from companies that deal with software tools that
 21 facilitate architecture, engineering, and construction ("AEC"). An Epic business partner,
 22 Licensee Four, expressed serious concerns that its customers would no longer have access to the
 23 latest version of the macOS "TwinMotion"—a 3D-immersion software based on *Unreal Engine*,
 24 which produces images, panorama pictures, and virtual reality videos used in AEC. Licensee
 25 Four has developed tight integrations between its own AEC software and TwinMotion. These
 26 integrations would be significantly impaired should Apple terminate Epic's developer accounts.

27

 28 ¹ The names of specific companies have been redacted due to confidentiality concerns, but
 the communications can be made available to the Court for *in camera* review.

1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
2 and correct and that I executed this declaration on September 4, 2020, in Nags Head, North
3 Carolina.

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5 
6 /s/ [Nicholas Penwarden \(Sep 4, 2020 21:31 EDT\)](#)
Nicholas Penwarden

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